Mr. Wylie argued that the mental element of possession does not enter into section 18 and that once possession, without any mental element is proved, the only means by which an accused can escape conviction is to bring himself within the provisions of the proviso to that section.

A line of local cases culminating in *R. v. Liew How Yeong*[7], has established that, in order to prove "possession" of opium or similar forbidden articles, it must be established affirmatively :—

(a) that the accused had actual or potential physical control thereof; and

(b) that he had the intention to exercise such control.

That case dealt with section 11 (3) (d) of the Straits Settlements Ordinance (Cap. 223), which reads :—

> No person shall, except as permitted by this Ordinance or by any rules made thereunder —
>
> .....
>
> (d) have in his possession, custody or control any chandu other than Government chandu.

We can find nothing in the wording of section 18 of the Proclamation to justify us in not following the decision in that and previous relevant cases.

If the Legislature intended section 18 to dispense with proof of the mental element of possession, they have failed to do so. From a careful examination of the provisions of that section it is clear that the first proviso thereto only provides for a person found in "possession" of a forbidden article escaping liability if he proves he did not know "the nature quality or contents" of it. Nowhere in the proviso is provision made for a person escaping liability if he proves he had no knowledge that the forbidden article was in his "possession". In a penal statute, such as this, it cannot have been the intention of the Legislature to punish persons, who can prove that forbidden articles under the Proclamation were in their "possession" without their knowledge.

We are fortified in this view by the amendment to sub-section (2) of section 3 of the Proclamation made by Gazette Notification No. 6005 of 1947. That amendment is as follows :—

> Any opium or chandu which is found on any part of any premises shall be deemed, unless the contrary be proved, to be in the possession of the occupier of such part of the premises.

No provision comparable to this applies to vehicles.

Accordingly, since there is no evidence whatsoever to prove that the first appellant knew he had possession, custody or control of this opium, his conviction cannot stand. His appeal is allowed and his conviction and sentence quashed.

As regards the second appellant we have already decided that the statements made by him to the Senior Customs Officer and to Mr. Kandiah are inadmissible. Apart from those statements there is no other evidence to support his conviction. Accordingly his appeal is also allowed and his conviction and sentence quashed. The order of forfeiture against his car P.776 is set aside and we order that the car should be returned to him.

Finally, we wish to stress that this decision turns on the particular provisions of the Opium and Chandu Proclamation.

Appeal Allowed.
Conviction and Sentence Quashed.

M. M. ALLY & CO. v. CHELLAMAH (f)

[App. Civil Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, J.J.) October 1, 1948]
[Federation of Malaya — Civil Appeal No. 13 of 1948]

Contract Enactment (Cap. 52) Ss. 38 and 67 — Tender of rent — What constitutes a valid tender.

This was an appeal from the decision of Russell, J. (reported in (1948) M.L.J. 178) who dismissed an appeal from the District Judge, Kuala Lumpur. The main issue on appeal was whether rent due for the premises were in arrears and whether there had been a sufficient tender of rent by the tenants. The tenant in this case had previously sent the rent to the landlord but the landlord had refused to accept the rent. On the 28th of November 1946 the tenants wrote through their Solicitors a letter in the following terms:—

> "With reference to your letter dated 14th November 1946 our client informs us that he sent a Money Order for $50/- being rent for the month of April and May 1946 on the 11th of June 1946 with a covering letter which was returned to our client saying that your client refused to accept it. Again on the 15th of July 1946 our client sent a cheque for $25/- for payment of rent for the month of June. Again it was sent back to our client. Our client repeated this process for the months of July and August with similar results. Now if your client is agreeable and if she undertakes to issue receipts for payment of rent for the months from April to October 1946, we will send you back the said money order for $50/- and a fresh cheque for $125/-.
>
> As regards the repairs our client wrote to your client on the 11th of June 1946 informing her of the bad condition of the roof. This letter was returned to our client undelivered. Since receiving of that letter the condition has become worse. Our client has spent $112.70. This amount will have to be paid by your client."

Russell, J. held that this letter did not constitute a valid tender of the rent and he further held that as rent was in arrears the landlord was entitled to an order of possession for the premises. The tenants appealed against this decision.

Held, (1) that the tenants were not at the date of the letter of the 14th November 1946 under any obligation to make formal tender of the rent apparently due to the landlord, since by reason of the landlord's default, no rent was at that moment "due and payable"; (2) that the tenants did in fact by the letter of the 14th November 1946 make a tender of all rent which could possibly be considered to be in "arrear" before the action was brought, and that they did so before the rent was so far "in arrear" as to entitle the landlord to give a lawful notice to quit; (3) that the mode of tender satisfied, in the special circumstances, all the requirements of Section 38 of the Contract Enactment; and (4) that the tenants were therefore never "in arrear" as regards payment of rent, that the notice to quit was unlawful and void and that the tenants were entitled, subject to payment of rent due, to continue in occupation of the premises.

Cases referred to :—

(1) *Beale and Taylor Case* 1 Leonard 237.

(2) *Makin v. Watkinson* L.R. 6 Ex. 25.

(3) *Kamaya Naik v. Rudra Naik* I.L.R. (1896) 22 Bom. 440.

(4) *Venkatrama Ayyar v. Gopalakrishna* I.L.R. (1928) 52 Mad. 322.

(5) *Graham v. Seal* (1918) 119 L.J. 526.

(6) *Owners of the "Norway" v. Ashburner* (1865) 3 Moore P.C. N.S. 24.

CIVIL APPEAL.

R. Ramani and *P. P. Nair* for the Appellants.

F. J. Woodward for the Respondent.

Willan, C. J. : —I have had the advantage of reading and studying the judgment of Briggs J. That judgment so fully accords with the opinion and views I had formed on the various points raised and the arguments put forward thereon, that it seemed to me unnecessary to write a separate judgment.

Spenser-Wilkinson, J. : —I have had the opportunity of reading the judgment of Briggs J. with which I entirely agree. I have nothing to add.

Briggs, J. : —In Kuala Lumpur District Court Civil Suit No: 41 of 1947, the Respondent, Chellamah (f), hereinafter called "the landlord", sued the Appellants, M. M. Ally & Co., hereinafter called "the tenant", for possession of a house known as No: 4 (ii) Ceylon Road, Kuala Lumpur; for the sum of $475 for rent of those premises from October, 1945, to April, 1947, inclusive; for liberty to apply, after removal of the present restrictions on jurisdiction, for the further sum of $50 for rent for August and September, 1945; and for double rent for holding over from the lst May, 1947, until delivery of possession. The District Judge made an order for possession and gave judgment for rent at $25 per month from March, 1946, to April, 1947, inclusive, and for double rent at $50 per month from 1st to 28th May, 1947, and thereafter at $40 per month until delivery of possession, subject to a deduction of $137-70 for repairs done. He also gave liberty to apply in respect of the rent for August and September, 1945, and awarded costs to the landlord. The tenants appealed to the High Court. The appeal was dismissed by Russell J., against whose decision the tenants appealed to the Court of Appeal.

The tenancy was created in 1942 and the premises are a house of wood and attap construction. The agreed rent during most of the period material for the purpose of these proceedings was $25 per month, but by an order of the Rent Board made on the tenants' application in 1947 the rent from and after 29th May, 1947, is fixed at $20 per month. It is common ground that the landlord undertook, as a term of the tenancy, liability to keep the house in reasonable repair; but it was alleged by the landlord that it was further agreed that that liability should arise only if the tenant made a demand on the landlord, and the landlord, in her unfettered discretion, decided to effect the repairs herself. In other words, it was contended that in this tenancy the normal right of the tenant, on default of repair by the landlord after notice, to carry out repairs, pay for them and deduct the cost from the rent, was excluded by express agreement. This contention the District Judge rejected, and the learned appellate Judge did not disturb his finding. No serious attempt was made to contest this part of the decision, and I have no doubt that it was correct.

The tenants having given due notice of the need for repair, and the landlord having failed to repair as demanded, the tenants were entitled in law, after notice, to effect the repairs and pay therefor, and to deduct the amount of such payment from the rent due, or to become due, *Beale and Taylor Case*[1], *Makin v. Watkinson*[2]. They did this in respect of the sum of $125 in 1945. They similarly spent a sum of $25 in 1946 and a sum of $112.70 in 1947, and claim the right to deduct these in like manner. The nature of the premises sufficiently explains the need for these repairs which, in relation to the amount of the rent, were substantial. It was found, however, and is not now disputed, that the repairs were necessary and were properly done.

The landlord, evidently wishing to minimize or evade her liability to repair, adopted tactics which are regrettably common in this country. She failed at

first to reply to the tenants' requests, and at a later stage refused to accept their registered letters forwarding to her remittances for rent. She persistently refused to give credit or issue receipts for the sums properly spent on repairs, and on 18th March, 1946, in the first letter from her which was put in evidence, she wrote that she would not be liable for any repairs at all. It is perfectly clear that the tenants repeatedly attempted, and were at all times ready and willing, to pay all rent as it became due, subject only to receiving credit, to which they were lawfully entitled, for the sums paid by them for repairs. The landlord refused to receive payment on these terms, and improperly purported to apply some payments, which she did accept, against rent which had really been satisfied by the payments for repairs. The position crystallized when, having repeatedly had their cheques returned, the tenants wrote through their solicitors the letter dated 28th November, 1946, which became Exhibit P2 in the trial and reads as follows :—

Doraisamy Aiyer & Nair,
Advocate & Solicitor,
F.M.S.

68, Klyne Street,
Kuala Lumpur,
28th November, 1946.

To:

Messrs. Bannon & Bailey,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

4, Ceylon Road — M. M. Ally & Co.

With reference to your letter dated 14th November 1946 our client informs us that he sent a Money order for $50/- being rent for the month of April and May, 1946 on the 11th of June 1946 with a covering letter which was returned to our client saying that your client refused to receive it. Again on the 15th of July 1946 our client sent a cheque for $25/- for payment of rent for the month of June. Again it was sent back to our client. Our client repeated this process for the months of July and August with similar results.

Now if your client is agreeable and if she undertakes to issue receipts for payment of rent for the months from April to October, 1946, we will send you back the said money order for $50/- and a fresh cheque for $125/-.

As regards the repairs our client wrote to your client on the 11th of June 1946 informing her of the bad condition of the roof. This letter was returned to our client undelivered. Since receiving of that letter the condition has become worse. Our client has spent $112.70. This amount will have to be paid by your client.

Yours faithfully,
(Sgd.) Doraiswamy Aiyer & Nair.

The landlord sent no reply to Exhibit P2, but on the 21st March, 1947, on the basis that rent was more than 14 days in arrear and that she was therefore entitled to determine the tenancy by notice to quit, she gave the tenants notice to quit and on its expiration filed suit. The notice was admitted, and the crucial question at the trial and in this appeal was whether, at the critical date, rent was in arrear so as to entitle the landlord under the provisions of the Rent Restriction legislation to give that notice.

The tenants also raised the defence that the suit was barred by the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, as amended by the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, both as concerning a dealing in land which took place during the Japanese occupation and also as involving the consideration of questions relating to Japanese currency. In considerating this question the relief claimed in the plaint, and the alleged facts on which it is claimed, are the paramount consideration. In this suit, the claim was for :—

(i) Ejectment.

(ii) Rent in respect of October 1945 and subsequent periods.

(iii) Liberty to apply to the Court, on the removal of the restriction, in respect of rent for August and September 1945.

There was clearly jurisdiction to grant relief on all three of these claims, and that jurisdiction was not destroyed by the fact that some of the matters later considered at the trial occurred during the occupation period, at which time transactions were carried out in Japanese currency. On this issue the tenants failed at the trial and on first appeal, and I have no doubt that those decisions were right.

The tenants contended that on the facts of the case they had made such an offer of payment as would satisfy the terms of section 38 of the Contract Enactment. I refer to this as "the defence of tender". They also contended that the provisions of section 67 of the Contract Enactment applied, and that, even if the defence of tender failed, their failure to pay was due solely to the refusal of the landlord to accept payment, and their non-payment should therefore be excused. Accordingly, they were not, in the special circumstances, "in arrears". I think that both these contentions are right.

As regards tender, a mere offer by letter to pay a sum due does not ordinarily amount to a sufficient tender in this country, since it does not afford the promisee the facilities set out in paragraph (b) of subsection (ii) of section 38 above referred to. See *Kamaya Naik v. Rudra Naik* [3]. But the requirements of section 38 are practical, and not merely technical,

and the question whether those requirements have been fulfilled can only be answered by reference to the facts of a specific case. The law here is not the same as in England, and it is not correct here to say without qualification that on tender of payment actual money must be produced.

The practical test is, assuming the creditor desires to obtain payment, does the tender afford him an immediate and certain means of obtaining payment either in cash or, if he is willing to accept it, in another medium, e.g. a cheque. Willingness to adopt another medium may be inferred from past conduct. If in a series of transactions cheques have always been accepted, it would be unreasonable to say that tender by cheque was improper, unless notice had been given beforehand that a cheque was no longer acceptable, or circumstances were such that the cheque would not be met. Many circumstances may arise which render actual production of money unnecessary. One is a wrongful refusal to accept payment at all. An example of this is to be found in *Venkatrama Ayyar v. Gopalakrishna Pillai*[4]. Another is a wrongful refusal to accept the payment, on the ground that the amount offered is less than the amount legally due. See *Graham v. Seal*[5]. Where this occurs, and no objection is taken at the same time to the *form* of the tender, it is treated under our law as satisfying the requirements of s. 38, above. The effect of the English law is similar, though the reasoning is different. In *The Owners of the "Norway" v. Ashburner*[6], the Privy Council held in an Admiralty case that, when an offer of payment is wrongly refused on the ground of insufficiency, a "constructive waiver of tender" occurs and, even if the debtor had intended to tender only a sum less than was legally due, he should, if the creditor insists on a sum *more* than is legally due, be treated as if he had lawfully tendered the correct amount.

This decision appears to me important, not only in its bearing on section 38, but even more so in connection with section 67 of the Contract Enactment. The commentaries on section 67 do not appear to consider its application to payment of a debt, perhaps because it is not usual for a creditor to refuse to allow a debtor to pay him: but the special circumstances created by the Rent Restriction legislation may often make it apparently advantageous for a creditor to do so. He may think that if, by refusal to accept rent, he can make it appear that his tenant is in arrear, he may be able to recover possession of premises which otherwise his tenant would be entitled to continue to occupy.

The Court is not constrained to countenance so discreditable a proceeding. A man cannot, by his own deliberate default, create an artificial default in another. If a landlord, by one device or another, prevents his tenant from properly paying his rent, he may not cease to be able to recover the monies concerned; but he certainly cannot thereafter come to Court and claim an advantage, (the right to ejectment), which, but for his own improper conduct, the law would have refused him. If a landlord wrongfully refuses to accept rent, which is lawfully due to him, the provisions of section 67 of the Contract Enactment will protect his tenant against the consequences of any apparent delay in payment.

Objection was also taken to Exhibit P2 on the ground that the offer of payment made thereby was "conditional", and so failed to satisfy the provisions of paragraph (a) of sub-section (ii) of section 38. The "condition" relied on was the demand for receipts for rent paid or to be paid, including rent paid by deduction of the cost of past repairs. In view of the now undisputed finding that those deductions were properly made, there can be no question that the tenants were entitled to receipts in respect of all the sums referred to, whether paid in money or by lawful deduction. The landlord may perhaps have thought at that time that they were not so entitled; but, if so, she was wrong. It was her duty to issue such receipts, and the demand for them could not amount to a "condition" contrary to the terms of section 38. The objection to the tender on this ground fails.

I am of opinion that the letter (Exhibit P.2.) was, in the special circumstances, a sufficient and proper tender of any rent then due, and I am further of opinion that, in the special circumstances, there was no longer, at the date on which Exhibit P2 was written, any obligation on the tenants to make a formal tender, or indeed to do anything more than continue to be, as they were, ready and willing to pay all monies lawfully due by them, whenever the landlord might be ready to abandon her previous wrongful position and accept such payment.

It may also have been necessary for the tenants to inform the landlord of such attitude on their part. I do not so hold; but I hold that, if that was necessary, Exhibit P2 exactly fulfilled their duty in that respect.

For these reasons I hold, first, that the tenants were not, at the date of Exhibit P2, under any obligation to make formal tender of rent apparently due to the landlord, since, by reason of the landlord's

default, no rent was at that moment, "due and payable". I hold, secondly, that the tenants did in fact, by means of Exhibit P2, make a tender of all rent which could possibly be considered to be "in arrear" before this action was brought, and that they did so before the rent was so far "in arrear" as to entitle the landlord to give a lawful notice to quit. I hold, thirdly, that the mode of tender satisfied, in the special circumstances, all the requirements of section 38 of the Contract Enactment. And, fourthly, I hold that the tenants were never "in arrear" as regards payment of rent, that the notice to quit was unlawful and void, and that the tenants are entitled, subject to payment of rent due, to continue in occupation of the premises at the revised rent of $20 per month now fixed by the Rent Board.

This appeal should be allowed and the orders of the High Court and the District Court set aside. The tenants did not pay into Court the amount due to the landlord, when they raised the defence of tender, but they had offered again by letter dated 3rd April, 1947 (Exhibit P3) to pay it. There should therefore be judgment for the amount appearing, on the findings of the District Judge, to be due, in respect of rent, but not double rent, making due deductions of the sums of $25 and $112.70 payable by the landlord in respect of repairs effected by the tenants. The order should declare that, as between the parties, the rent of the premises is not at the date of the order and has never been "in arrears" within the meaning of section 12 of the Control of Rent Ordinance, 1948. As regards costs, although the landlord obtains judgment for a sum of money, her action failed on all the substantial issues and should never have been brought. Accordingly, she should pay to the tenants the costs of the suit in the District Court. The costs of the appeal to the High Court and of this appeal should also be paid by the landlord to the tenants, and the amount due by the tenants to the landlord in respect of rent, not only before action brought, but up to this date, should be set off against the amount of such costs when taxed. Unless the learned President shall initial minutes of the order to be passed, there should be liberty to apply to a single judge of the Court of Appeal to settle the minutes of the order.

Appeal Allowed.